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Date of Decision: 9th/10th November 1995

CRIMINAL APPEAL NO. 455 OF 1989 WITH
CRIMINAL APPEAL NO. 527 OF 1989

FOR APPROVAL AND SIGNATURE

THE HONOURABLE MR. JUSTICE A.N. DIVECHA
and
HONOURABLE MR. JUSTICE H.R. SHELAT

1. Whether Reporters of Local Papers may be allowed to see the judgment? Yes

2. To be referred to the Reporter or not? No

3. Whether their Lordships wish to see the fair copy of judgment? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? No

5. Whether it is to be ci...

Civil Judge? No

Shri A.J. Patel, Advocate, for the Appellants (in both matters)

Shri S.T. Mehta, Addl. Public Prosecutor, for the Respondent (in both matters)

CORAM: A.N. DIVECHA & H.R. SHELAT, JJ.
(Date: 9th/10th November 1995)

ORAL JUDGMENT (per Divecha, J.)

Both these appeals are directed against the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge of Ahmedabad (Rural) on 29th July 1989

in Sessions Case No. 138 of 1988. Criminal Appeal No. 455 of 1989 has been filed by original accused Nos. 2 to 5 in the trial court as they have been convicted of the offences punishable under sec. 302 of the Indian Penal Code, 1960 (the IPC for brief) and also under sec. 302 read with sections 147, 148 and 149 of the IPC as well as under sec. 307 thereof as also under sec. 307 read with sections 147, 148 and 149 thereof as well as under sec. 429 thereof. They have been sentenced to rigorous imprisonment for life and fine of Rs. 2000 in default rigorous imprisonment for one year for the offence punishable under sec. 302 of the IPC and rigorous imprisonment for 6 months for each offence punishable under sec. 302 read with sections 147, 148 and 149 thereof and fine of Rs. 2000 for each offence in default simple imprisonment for one month and rigorous imprisonment for 10 years and fine of Rs. 4000 in default simple imprisonment for 6 months for the offence punishable under sec. 307 thereof and rigorous imprisonment for 6 months and fine of Rs. 2000 in default simple imprisonment for one month for the offences punishable under sec. 307 read with sections 147, 148 and 149 thereof and rigorous imprisonment for one year and fine of Rs. 1000 in default simple imprisonment for 15 days for the offence punishable under sec. 429 thereof. Criminal Appeal No. 527 of 1989 has been preferred by original accused No. 1 as he has been convicted and sentenced in the like manner. Common questions of law and fact are found arising in both these appeals and we have therefore thought it fit to dispose of both these appeals by this common judgment of ours.

2. The facts giving rise to these two appeals move in a narrow compass. It would be better to refer to the appellants as they were appearing before the trial court as the accused in Sessions Case No. 138 of 1988. The appellant of Criminal Appeal No. 527 of 1989 was accused No. 1 and the appellants of Criminal Appeal No. 455 of 1989 were accused Nos. 2 to 5 respectively in the sessions case in question. For the sake of convenience we shall refer to the appellants of both these appeals as they were in the capacity of the accused in the trial court. Accused No. 2 is the father and the remaining accused are his sons. They were cultivating one parcel of land situated in the sim of village Gyaspur on the bank of the river Sabarmati. It is the case of the prosecution that they had their shanty practically adjacent to the parcel of land cultivated by them. The father was a licensed gun-holder. It is the case of the prosecution that the complainant in the company of two persons, named, Kalabhai Shanabhai and Kanabhai Ramubhai (the deceased for convenience), had gone out from their place of ordinary abode at Shahwadi in search of some three missing animals. It is the case of the prosecution that the complainant and his two associates and some other like cattle holders were stationed at Shahwadi and some three animals from

the herd of cattles belonging to some other owner were found missing. They therefore went out in search of the missing animals during early hours of 2nd August 1988. They saw some animals in the parcel of land cultivated by the accused. They found accused Nos. 2, 3, 4 and 5 armed with dhariyas beating the animals. They tried to intervene and requested the accused to stop beating the animals. At that time accused No. 1 was armed with a gun in his hands. He thereupon fired three shots at them resulting into the death of the deceased and injury to Kalabhai Shanabhai (Prosecution witness No. 2 at Exh. 16). They therefore ran away therefrom for life. They informed the brother of the victim of the assault about the incident. That resulted in collection of some 15 persons. All of them went to the scene of offence. They found the deceased to be dead thereat. It appears that in the meantime the deputy sarpanch of the village had informed the police about some scuffle between Thakores and Bharwads (that is, between the complainant and his associates and the accused). The police was also found at the scene of offence when the complainant in the company of some 14 or 15 persons reached thereat. The complainant thereafter gave his complaint to the police. The necessary formalities like the inquest panchnama, the scene of offence panchnama were completed. On completion of investigation, the charge-sheet against the accused was filed in the court of the Chief Judicial Magistrate of Ahmedabad (Rural) at Narol. They were charged with the offences punishable inter alia under sec. 302 of the IPC. Since the case was triable by the court of sessions, it was committed to the Court of Sessions of Ahmedabad (Rural). It came to be registered as Sessions Case No. 138 of 1988. The case was assigned to the learned Additional Sessions Judge for trial and disposal. The charge against the accused was framed on 5th May 1989. No accused pleaded guilty to the charge. Thereupon they were tried. After recording evidence and recording the further statement of the accused under sec. 313 of the Code of Criminal Procedure, 1973 (the Cr.P.C. for brief), by his judgment and order passed on 29th July 1989 in the aforesaid sessions case, the learned trial Judge convicted and sentenced all the accused as aforesaid. Being aggrieved thereby, accused Nos. 2 to 5 have preferred Criminal Appeal No. 455 of 1989 and accused No. 1 has preferred Criminal Appeal No. 527 of 1989.

3. It is difficult to agree with learned Advocate Shri A.J. Patel for the appellants in both the appeals that the prosecution has failed to establish its case beyond reasonable doubt. The evidence on record clearly establishes the fact that at the relevant time accused No. 1 was armed with a gun and accused Nos. 2 to 5 with dhariyas. It has been clearly established at trial that some three animals had entered the parcel of land cultivated by the accused and accused Nos. 2 to 5 were beating them with their dhariyas. Such beating of

animals by accused Nos. 2 to 5 with dhariyas resulted in certain injuries to the animals as testified by prosecution witness No. 11 at Exh. 47. The prosecution has also clearly established the fact that the complainant in the company of the deceased and Kalabhai Shanabhai had reached the land cultivated by the accused at about 2.30 a.m. on 2nd August 1988. The evidence on record unmistakably shows that at that time accused No.1 was armed with a gun. It is also established that gun shots were fired by accused No.1 resulting in the death of the deceased and injury in leg to Kalabhai Shanabhai (prosecution witness No. 2 at Exh. 16). In view of the overwhelming evidence on record, it is difficult to accept the submission urged before us by learned Advocate Shri Patel for the appellants that the incident in question has not occurred in the manner as deposed to by the witnesses on behalf of the prosecution.

4. Learned Advocate Shri Patel for the appellants has then submitted that the charge against the accused based on sections 147, 148 and 149 of the IPC has not been established and there is no evidence worth the name on record to establish that charge against them. He has further submitted that what was done by the accused at the relevant time was by way of private defence and the accused need not be held penally liable even if it is held that the prosecution has established its version of the incident beyond reasonable doubt. It has also been urged on behalf of the appellants that in any case the offence punishable under sec. 429 of the Act is also not established and the beating of animals by accused Nos. 2 to 5 was by way of private defence for protection of their property as those animals were damaging the standing crop in the parcel of land cultivated by them. As against this, learned Additional Public Prosecutor Shri Mehta has submitted that the learned trial Judge has carefully scanned and scrutinised the evidence on record and has come to the conclusion that the accused are guilty of the offences with which they were charged and no case is made out by or on behalf of the appellants to interfere with the just and legal order of conviction and sentence passed by the learned trial Judge. It has been urged on behalf of the prosecution that the further statement under sec. 313 of the Cr.P.C. is absolutely silent as to exercise of the right of private defence by the accused or any of them. In that view of the matter, runs the submission of learned Additional Public Prosecutor Shri Mehta for the respondent, the right of private defence as urged on behalf of the appellants is not at all worthy of consideration. Besides, according to him, sec. 105 of the Evidence Act, 1872 (the Act for brief) casts burden on the accused with respect to exercise of the right of private defence and such burden has not been discharged by the accused or any of them in any manner. In that view of the matter, it has been urged on behalf of the prosecution that the impugned judgment

and order of conviction and sentence calls for no interference by this court in these appeals in any manner.

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5. The ocular account of he incident is given by prosecution witnesses Nos. 1 and 2 at Exhs. 15 and 16. Neither of them has stated in clear and unequivocal terms that all the accused were together in attacking them and their deceased companion when accused No.1 shot at them. In order to constitute an unlawful assembly with some common object, it would be necessary that members of the unlawful assembly should be together for the purpose of some overt act. It transpires from the evidence of the eye witnesses at Exhs. 15 and 16 that accused Nos. 2 to 5 were engaged in beating animals. It is not their case that, while accused No. 1 was using his fire arm, they practically surrounded him to protect him against any likely attack from the witnesses and their deceased companion. It is not their case either that they instigated accused No.1 with a view to realising the common object of shooting the deceased and the eye witnesses. Besides, if the prosecution case is accepted at its face value, all the five accused were residing together in the shanty near the parcel of land cultivated by them. As pointed out hereinabove, accused No.2 is the father and the remaining accused are his sons. It would therefore be but natural that the father and the sons were found residing together. That would also somewhat militate against formation of the unlawful assembly in view of their natural togetherness. We are therefore of the opinion that the prosecution has failed to establish the case against the accused for the purposes of sections 147, 148 and 149 of the IPC.

6. So far as accused No.1 is concerned, the prosecution has undoubtedly estbalished that he was armed with a gun at the relevant time and he shot at the deceased and his companions, that is, the eye witnesses at Exhs. 15 and 16. Learned advocate Shri Patel for the accused has submitted that the use of the fire arm by accused No.1 was in exercise of his right of private defence. It cannot be disputed that some animals had entered the field cultivated by the accused at the relevant time. As transpiring from the panchnama of the scene of offence at Exh. 20, the animals entering the field had somewhat damaged and ravaged the standing crop. With a view to driving those animals out of the field, accused Nos. 2 to 5 beat the animals with their dhariyas. It is the prosecution case that the deceased and the witnesses at Exhs. 15 and 16 had gone near the scene of offence in search of the missing animals. At that stage, it appears that there was heated exchange of words between the accused, more particularly accused No.1, and the deceased and his companions. It is the case of the witnesses at Exhs. 15 and 16 that they had no arms with them nor had the

deceased any with him. It is clearly borne out from the evidence that the deceased was possessed of a ringed stick with 7 knots about 5 ft. in length at the relevant time. To that extent, the version given by the witnesses at Exhs. 15 and 16 that they were without any arms stands falsified. In fact, the natural conduct of the witnesses at Exhs. 15 and 16 and their deceased companion would be that they would be armed with some sticks because they were in search of their missing animals and they would drive those animals to their destination, if found, with the use of sticks if and when necessary. Even if it is believed that the witnesses at Exhs. 15 and 16 had no weapons whatsoever with them including sticks, the fact remains that the deceased was armed with a ringed stick with 7 knots and 5 ft. in length. Of course, there is nothing on record to show that a blow from the stick was sufficient to prove fatal to the victim. However, keeping in mind the nature of the stick as found and keeping in mind the common knowledge that persons of the witnesses at Exhs. 15 and 16 and their deceased companion would be well built, the possibility that one single blow with the stick in question could prove fatal cannot altogether be ruled out.

7. Learned Additional Public Prosecutor Shri Mehta for the State has submitted that the plea of private defence has not been taken by or on behalf of the accused specifically at trial. Absence of a specific plea in that regard will not preclude the accused from harping upon such plea if the material on record would permit the defence to take recourse to such plea. We are fortified in our view by the binding ruling of the Supreme Court in the case of State of U.P. v. Ram Swarup and another reported in AIR 1994 SC 1570. In Para 9 thereof at page 1572 it has been observed :

"Unlike in a civil case, it is open to a criminal court to find in favour of an accused on a plea not taken up by him, and by so doing the court does not invite the charge that it has made out a new case for the accused. The accused may not plead that he acted in self-defence and yet the court may find from the evidence of the witnesses examined by the prosecution and the circumstances of the case either that what would otherwise be an offence is not one because the accused has acted within the strict confines of his right of private defence or that the offence is mitigated because the right of private defence has been exceeded."

8. It may be noted that suggestion to the witnesses at Exhs. 15 and 16 in their cross-examination is quite eloquent as to the exercise of private defence on the part of the accused, more particularly accused No. 1. Besides, accused No.2 has

also given his complaint with respect to the incident. That gave rise to Sessions Case No. 139 of 1988. A copy of the complaint in that case is at Exh. 81 on the record of the case. This piece of evidence on record also goes to show and to suggest that the accused were, more particularly accused No.1 was, attempting to act for their private defence.

9. We agree with learned Additional Public Prosecutor Shri Mehta that, since the other accused were armed with dhariyas, it was not necessary for accused No.1 to have used the fire arm in his hand. It is the case of accused No.1, as transpiring from the complaint at Exh. 81, that he wanted to scare the witnesses at Exhs. 15 and 16 and the deceased away from the scene of offence as he feared assault by them. Besides, as transpiring from the complaint at Exh. 81 on the record of the case, he fired one shot in air and he attempted two more shots to be fired in air but the cartridges did not explode. Thereafter he fired another shot. The panchnama of the scene of offence at Exh. 20 bears testimony to the fact of two unexploded cartridges as two unexploded cartridges were found on the spot. That probabilises the version put up by and on behalf of the accused in the complaint at Exh. 81 on the record of the case.

10. We are however in respectful agreement with learned Additional Public Prosecutor Shri Mehta for the State that the accused, more particularly accused No. 1, exceeded their right of private defence. Even at the cost of repetition, we may reiterate that accused Nos. 2 to 5 were armed with dhariyas. It is everyone's common knowledge that a dhariya is a sharp cutting weapon. It is established by the prosecution at trial that the witnesses at Exhs. 15 and 16 and their deceased companion were the only persons having gone near the field of the accused at the relevant time in search of the missing animals. The accused were five in number. With the help of dhariyas in the hands of accused Nos. 2 to 5, they could have easily resisted any likely assault by the witnesses at Exhs.15 and 16 and their deceased companion. There was no necessity or need to use the fire arm on the part of accused No. 1 even if he wanted to scare away the witnesses at Exhs. 15 and 16 and their deceased companion. It is true that the accused had their right of private defence qua their property and also with respect to their person. Even at the cost of repetition, we may reiterate that the animals were found to have entered the field and were found to have damaged and ravaged the standing crop to some extent. It has also been established at trial that the deceased was armed with a ringed stick with 7 knots and 5 feet in length. The apprehension of attack by the deceased and his companions at the relevant time on the accused, more particularly accused No. 1, could not altogether be ruled out. However, resort to the use of the fire arm by accused No. 1 in self-defence was not at all justifiable in view of the fact that

the other accused were armed with dhariyas and the weapons in their hands were sufficient to repel any kind of assault or attack on the accused including accused No. 1. We are therefore of the opinion that accused No.1 has exceeded his right of private defence in use of the fire arm in his hands. In that view of the matter, accused No.1 can be said to have committed the crime of culpable homicide not amounting to murder.

11. So far as the offence punishable under sec. 429 of the IPC is concerned, accused No.1 was not a party thereto. Accused Nos. 2 to 5 were found beating the animals with their dhariyas. As transpiring from the medical evidence in the form of the oral testimony of prosecution witnesses No. 11 at Exh.. 47, the three animals sustained injuries with dhariyas used by accused Nos. 2 to 5. The injuries may not be serious but nonetheless they were of considerable magnitude. We however agree with learned Advocate Shri Patel for the accused that the act of injuring the animals with their dhariyas by accused Nos. 2 to 5 would not constitute the offence punishable under sec. 429 of the IPC. We however agree with learned Additional Public Prosecutor Shri Mehta for the State that in any case it would amount to an attempt to commit the said offence. It would therefore be punishable under sec. 511 read with sec. 429 of the IPC.

12. It transpires from the evidence of the witnesses at Exhs. 15 and 16 that both of them were injured by the shots fired by accused No.1 with his gun. We have already indicated earlier that accused No.1 has exceeded his right of private defence. In that view of the matter, there is no hesitation in coming to the conclusion that accused No. 1 can be said to be guilty of attempt to commit culpable homicide qua the aforesaid two witnesses. He can therefore be said to have incurred penal liability under sec. 308 of the IPC.

13. In view of our aforesaid discussion, we are of the opinion that the prosecution has not proved the case against the accused beyond reasonable doubt qua the offences punishable under sec. 302 and sec. 307 read with sections 147, 148 and 149 of the IPC and also under sec. 429 thereof beyond any reasonable doubt. The conviction and the sentence of the accused thereunder cannot therefore be sustained in law. We are of the opinion that the prosecution can be said to have established beyond reasonable doubt that accused No.1 was guilty of the offence punishable under sec. 304 (part 2) of the IPC and the other accused of the offence punishable under sec. 511 read with sec. 429 thereof.

14. That would bring us to the question of sentence. Accused No.1 has admittedly been in custody since 2nd August

1988. He has thus remained in custody for little less than 8 years. The punishment to be awarded to him under sec. 304 (part 2) would be 10 years at the most. We are therefore of the opinion that he should be punished with the imprisonment already undergone. So far as accused Nos. 2 to 5 are concerned, we are informed that they were taken in custody and kept as undertrial prisoners from 2nd August 1988 till they were released on bail by the order of the competent court on 1st December 1988. They therefore remained in police custody as undertrial prisoners for nearly one month. We are also informed that they were taken into custody soon after the judgment was pronounced by the learned trial Judge on 29th July 1989. They have thus remained in jail for a further period of nearly 20 days as convicts as they were released on bail by the order of this Court passed on 17th August 1989. Thus they have suffered imprisonment for nearly 50 days. We are told that accused Nos. 2 to 5 have been on bail since 17th August 1989 and they have settled in life. We are told by learned Advocate Shri Patel for the accused that no criminal activity thereafter has been alleged against them or any of them. Nearly 6 years have rolled by since they have been released on bail. It would therefore be in the fitness of things not to send them to jail again and the sentence to be awarded to them for the offence punishable under sec. 511 read with sec. 429 of the IPC should be the imprisonment already undergone by them in all for nearly 50 days.

15. In the result, these appeals are partly accepted. The impugned judgment and order of conviction and sentence qua sec. 302 and sec.307 and also qua sec. 302 and sec. 307 read with sec. 147, 148 and 149 of the IPC with respect to all the accused is set aside. Accused No. 1 is convicted of the offence punishable under sec. 304 (part 2) and sec. 308 thereof. He is sentenced to the imprisonment undergone so far for each of the offences and this sentence is ordered to run concurrently. Accused Nos. 2 to 5 are held guilty of the offence punishable under sec. 511 read with sec. 429 of the IPC and are punished with the imprisonment already undergone by each of them and fine of Rs. 1000 each in default simple imprisonment for 15 days. Accused No. 1 is ordered to be set at liberty if no longer required in any other case. The bail bonds furnished by the remaining accused are ordered to be cancelled.
